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NO. 1072

IN THE

Supreme Court of the United States

JULIAN QUINTERO, *Appellant*

v.

SINCLAIR REFINING COMPANY, *Appellee*

PETITION FOR CERTIORARI

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NO. _____

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JULIAN QUINTERO, *Appellant*

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SINCLAIR REFINING COMPANY, *Appellee*

PETITION FOR CERTIORARI

PETITION

Now Comes, Julian Quintero and files this his petition for writ of certiorari in the above captioned matter and would respectfully show:

(A) The official report of the Opinion delivered by the Fifth Circuit Court of Appeals below is to be found at 311 Fed. 2d. 217. Such Opinion is appended as provided in sub-paragraph 1 of Rule 23, Supreme Court Rules. There is no published opinion from the District Court.

(B) (1). The date of the judgment sought to be reviewed is December 11, 1962, and the date of entry is December 11, 1962.

(2). On the 11th day of March, 1963, the time for filing petition for writ of certiorari was extended to and including April 25, 1963.

Thereafter by order dated April 26, 1963, time for filing Petition for Writ of Certiorari was extended to and including May 6, 1963.

(3). The statutory provisions believed to confer jurisdiction on this Court is Rule 19B, Supreme Court Rules, 28 U.S.C.A. 1651.

(C) The questions presented for review are:

(1) The courts below placed an improper interpretation upon a federal statute, 46 U.S.C.A. 688, commonly known as the Jones Act, which incorporated 45 U.S.C.A. 51, commonly known as the FELA.

(2) The court below has improperly held that in a case submitted upon special interrogatories that it was not error to submit a special interrogatory which did not require the answer of an ultimate fact issue, but which at the same time confused the jury.

(3) The lower court's decision is in conflict with that of this Court.

(4) The lower court's decision is in conflict with the decisions of another court and required appellant to carry a heavier burden of proof than the law requires.

(D) The statutes which the case involves are as follows: 46 U.S.C.A. 688, commonly known as the Jones Act of March 4, 1915, C 153, paragraph 20, 28 Stat. 1185, June 5, 1920; C 250, paragraph 33, 41 Stat. 1007, see appendix, "D" and 45 U.S.C.A. 51, April 22, 1908; C 149, p. 1, 35 Stat. 65; August 11, 1939, C. 685, p. 1, 53 Stat. 1404, commonly known as the FELA, see appendix "E"

(E) Statement of the case:

This is a petition for writ of certiorari from the Fifth Circuit Court of Appeals from an opinion entered December 11, 1962, which sustained a judgment entered by the United States District Court For The Southern District of

Texas, which denied a recovery to appellant for an action for damages brought against his employer under the Jones Act, 46 U.S.C.A. 688, and under the general maritime law of unseaworthiness.

On or about April 24, 1959, appellant was employed by appellee, Sinclair Refining Company, aboard its vessel the SS P. W. Thirtle when he sustained injuries made the basis of this suit. Appellant alleged that such injuries occurred as the result of negligence of appellee, its agents, servants and/or employees, and/or the unseaworthiness of the SS P. W. Thirtle. Trial was to a jury to which the case was submitted upon special interrogatories inquiring as to whether or not appellee, its agents, servants and/or employees were negligent and if such was the proximate cause of the injury, or if its vessel was unseaworthy and if so, if such was a proximate cause of appellant's injuries, with instructions that if these interrogatories were answered in the negative, then the jury would not answer the other interrogatories. The court after first correctly instructing the jury that each of the parties must prove their respective contentions by a preponderance of the evidence, then required appellant to prove his case to the satisfaction of the jury. The jury found that the vessel was not unseaworthy; that appellee was not negligent and *contrary to the instructions, answered that the injury to plaintiff was the result of an unavoidable accident.**

The Court charged in part:

> "Now I think that constitutes all I have to say to you, Ladies and Gentlemen. You will understand I am sure that for the Plaintiff to recover he must prove to your satisfaction by a preponderance of the evidence that the vessel was unseaworthy or that the defendant

*See pp. 16 and 17 of Court's charge, pp. 27-28, infra.

was negligent. Those are the first and third questions and hence if you find in answer to No. 1 that the vessel was seaworthy or was not unseaworthy as I have put it here and if you find in answer to No. 3 that the defendant was not negligent, it will not be necessary for you to go through all these other questions and answer those questions, that will settle the matter. On the other hand, if you find that the vessel was unseaworthy or that the defendant was negligent, then you must proceed and answer all the remaining questions because they will then become material and important."

(F). Jurisdiction was given to the United States District Court under 46 U.S.C.A. 688, as per *Romero v. International Terminal Operating Co.*, 358 U.S. 354; 79 S. Ct. 468.

(G). The court below placed an improper interpretation upon a federal statute, to-wit, 46 U.S.C.A. 688, which incorporates by reference 45 U.S.C.A. 51, by upholding the submission of the interrogatory inquiring if appellant's injuries were the result of an unavoidable accident. This violated the precepts of the Jones Act, 46 U.S.C.A. 688, which gives to the injured seamen the same rights as were given to the railway workers under the FELA. Under the 1939 amendment of the FELA, all species of assumed risk were completely abolished. See, *Tiller v. Atlantic Coast Line Railroad Company*, 318 U.S. 54, p. 58, footnote 2, where the Court first equates assumption of risk as the equivalent of non-negligence and then says:

"We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not

> mean to leave open the identical defense for the master by changing its name to 'non-negligence' . . ."

Under the court's charge unavoidable accident was defined as being without negligence on the part of either party. The court below has obviously placed an interpretation upon the statute which allows the submission of such issue to the jury for the reason that this Court has heretofore squarely held that the defense of unavoidable accident is not a defense to an action based upon unseaworthiness. See, *Mahnich v. Southern Steamship Company*, 64 S. Ct. 455, p. 459, 321 U.S. 96, 103:

> "Its inadequacy rendered it unseaworthy whether the mate's failure to observe the defect was negligent or unavoidable."

As this Court said in the case, *Tiller* supra, unless great care is taken the employee's rights will be sacrificed under some other name. (Referring to assumed risk.)

(2). The Court below has improperly held that in a case submitted upon special interrogatories that it was not error to submit a special interrogatory which did not require the answer of an ultimate fact issue, but which at the same time confused the jury as to determining whose negligence did or did not cause the injuries made the basis of this suit. The jury in this case was first instructed that if they should answer interrogatories Nos. 1 and 3 against appellant, then they would not need to answer any of the other issues. *Thereafter, contrary to the court's instruction they answered the special interrogatory dealing with the issue of unavoidable accident.* The interrogatory dealing with unavoidable accident could not possibly involve the matter of seaworthiness. See *Mahnich* supra, and was not a proper

issue under the Jones Act submission of appellant's case. See, *Tiller* supra. Insofar as appellant's cause of action based upon negligence under the Jones Act is concerned, the only thing which he had to show was that the employer was negligent to some extent and that such employer's negligence played some part, even the slightest, in producing the injury made the basis of this suit. See, *Rogers v. Missouri Pacific Railroad Company*, 77 S. Ct. 443, p. 448, 352 U.S. 505, p. 506, where the Court in referring to the FELA statute said:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." Citing Cory v. Southern Pacific Company, 335 U.S. 520, 69 S. Ct. 275, 93 L. Ed. 208.

It is obvious from their action in answering the unavoidable accident interrogatory contrary to the court's charge that the jury was confused into believing that the Plaintiff assumed some specie of assumed risk which denoted as unavoidable accident in the charge by the court and thereby plaintiff's rights were sacrificed upon the defense of assumed risk which this Court has heretofore held was abolished by the 1939 amendment to the FELA under *Tiller*, supra.

(3) The lower ocurt's decision is in conflict with the decisions of the Court whether such interrogatory was meant to apply to negligence or unseaworthiness. If the court's intention was to submit the defense of unavoidable accident as a defense to appellant's cause of action based upon unseaworthiness, it was contrary to *Mahnich* supra. If the court's intention was to submit the defense of un-

avoidable accident as a defense to negligence under the Jones Act, then such was contrary to the decision of this Court in *Tiller*, supra, which held that the 1939 amendment to the FELA abolished the defense of assumed risk under whatever name it was known by: There was harm to appellant insofar as this was concerned as is shown by the fact that the jury contrary to the court's instruction answered the interrogatory on unavoidable accident even though it also answered the issues of negligence and unseaworthiness against appellant. It would seem that the jury probably was led to believe that this specie of assumed risk was a defense to this cause of action and, therefore, this taken in connection with the improper charge upon the standard of proof which appellant was required to prove his case by caused the rendition of an improper verdict herein.

(4) The court required appellant to carry an improper standard of proof and a heavier burden than the law requires when the court said:

> "You will understand I am sure that for the Plaintiff to recover *he must prove to your satisfaction by a preponderance of the evidence that the vessel was unseaworthy or the defendant was negligence.*"

And then pointed out specifically that those were the first and third questions which dealt with negligence of the employer and unseaworthiness of the vessel. This is contrary to the proper standard for establishing a fact in a civil case. All that a party is required to prove in a civil case is ". . . all that is required in a civil case is that a fact be proven by a preponderance of the evidence. . ." See, *Radius v. The Travelers Insurance Company*, 87 F. 2d 412, p. 415, paragraph 12, 13, Ninth Cir. of Appeals

opinion. This is contrary to the court of appeals decision below.

(H) Appended hereto is a copy of the decision of the Fifth Circuit Court of Appeals dated December 11, 1962, marked Exhibit A. Also appended hereto marked Exhibit B, is a copy of the court's judgment which contains the interrogatories submitted, and appended hereto marked Exhibit C is the charge of the court and the instructions.

WHEREFORE, premises considered, petitioner prays that the petition for certiorari be granted; that he be granted a hearing herein and that upon final hearing an order issue to the lower court setting aside the judgment heretofore entered, that the cause be reversed and new trial ordered and that all costs and disbursement herein be adjudicated against appellee.

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I hereby certify that two copies of the foregoing petition for writ of certiorari have been served upon the Honorable Don McNiel, Baker, Botts, Shepherd & Coates, attorneys for respondent, Sinclair Refining Company, by mailing same to him first class United States mail, postage prepaid, properly addressed to him at his office address on this the day of April, 1963.

W. JILES ROBERTS
Attorney for Petitioner

EXHIBIT A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19849

JULIAN QUINTERO, *Appellant*

v.

SINCLAIR REFINING COMPANY, *Appellee*

Appeal from the United States District Court for the Southern District of Texas

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(December 11, 1962)

Before HUTCHESON, CAMERON and JONES, Circuit Judges.

CAMERON, Circuit Judge: This is an appeal from a jury verdict and judgment aginst appellant, a longshoreman, who claims damages as a result of an injury sustained while working aboard appellee's vessel. The action was

based on unseaworthiness and negligence under the Jones Act, 46 U.S.C.A. § 68, and the case was submitted to the jury on special interrogatories. In answer to the interrogatories, the jury found that the appellee was not negligent, that the vessel was not unseaworthy, and that the injury was a result of an unavoidable accident.

Appellant's first complaint is the submission of the interrogatory inquiring as to "unavoidable accident." He argues that submission of this question in any form is prejudicial, because "In effect this is a specie of assumed risk." Whether he is correct or not as to whether "unavoidable accident" is a form of assumed risk, submission of that interrogatory was not prejudicial, because the jury specifically found that appellee was not negligent and that the vessel was not unseaworthy. In the absence of negligence or unseaworthiness, whether the accident was "avoidable" or not was immaterial and no liability could be placed on the shipower. *Neal v. Lykes Bros. Steamship Co., Inc.*, 5 Cir., June 28, 1962, No. 19413, __F. 2d __; and cf. *Jefferson v. Taiyo Kaium, K.K.*, 5 Cir., 1962, No. 19971, __F. 2d __.

Appellant next urges error in the charge that he had to prove his case "to the jury's satisfaction by a preponderance of the evidence" rather than "merely by a preponderance of the evidence," citing State court cases condemning the use of the word "satisfaction" in charges to the jury and claiming that the use of that word would require a greater burden of proof than a mere preponderance. Cf. No. 19694, *J. M. Blythe Motor Lines Corporation v. Jean Blanchette Blalock*, 5 Cir., Nov. 23, 1962, No. 19694, __ F. 2d __. The record discloses that the court in

its charge discussed in detail the burden cast on the parties to the action and that only once, in the summation of the charge, was the word "satisfaction" used.

Even assuming that the use of the challenged word was improper, looking as we must to the charge as a whole, e.g., *Bush v. Louisville & Nashville Railroad Co.*, 1958, 5 Cir., 260 F. 2d 854, we find that the charge accurately advised the jury of the law governing the burden of proof. That being true, the use of this one word under the circumstances here disclosed would not constitute reversible error.

The judgment of the court below is

AFFIRMED.

EXHIBIT B

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JULIAN QUINTERO, *Plaintiff*

v.

SINCLAIR REFINING COMPANY, *Defendant*

Civil Action No. 13,140

JUDGMENT

BE IT REMEMBERED that on the 19th day of March, 1962, came on to be heard the above entitled and numbered cause, whereupon, came the plaintiff, Julian Quintero, in person and by and through his attorney of record, and also came the defendant, Sinclair Refining Company, by and through its attorneys of records, whereupon, all parties announced ready for trial, and a jury of twelve duly qualified jurors, to-wit: Marvin W. Franer and eleven others, were duly drawn, empaneled and sworn in to try said cause, and then said cause proceeded to trial. Whereupon the parties continued to adduce their evidence until the 20th day of March, 1962, when both parties announced in open court that they had rested, and the case was thereafter, upon the 20th day of March, 1962, submitted to the jury upon the following special issues, to-wit:

QUESTION NO. 1

"Was the SS P. W. THIRTLE unseaworthy immediately before and at the time of Plaintiff's accident of April 24, 1959?

Answer She 'was' *or* "was not" unseaworthy.
To which the jury answered 'She was not'."

QUESTION NO. 2

"Was the unseaworthiness, if any you have found, a proximate cause of the Plaintiff's injury?

Answer 'It was' *or* 'It was not'.
To which the jury did not answer."

QUESTION NO. 3

"Do you find that Defendant Sinclair Refining Company was negligent in any particular immediately before and at the time of Plaintiff's accident of April 24, 1959?

Answer The Defendant 'was' *or* 'was not' negligent.
To which the jury answered "The defendant was not."

QUESTION NO. 4

"If you have found the Defendant negligent, state in what particular the Defendant was negligent.

To which the jury did not answer."

QUESTION NO. 5

"Was such negligence, if any you have found, a proximate cause of the Plaintiff's injury?

Answer 'It was' *or* 'It was not'.
To which the jury did not answer."

QUESTION NO. 6

"Find the damages sustained by Plaintiff as a direct and proximate result of his injury of April 24, 1959.

Answer 'State the amount in dollars and cents'.
To which the jury did not answer."

QUESTION NO. 7

"Was the Plaintiff Julian Quintero negligent in any particular immediately before and at the time of his accident of April 24, 1959?

Answer 'He "was" *or* "was not" negligent.'
To which the jury did not answer."

QUESTION NO. 8

"If you have found the Plaintiff negligent, state in what particular the Plaintiff was negligent."

To which the jury did not answer.

QUESTION NO. 9

"Was such negligence of the Plaintiff, if you have found, a proximate cause of his injury of April 24, 1959?

Answer '"It was" *or* "It was not".'"
To which the jury did not answer.

QUESTION NO. 10

"State in what proportion or percentage the Plaintiff's negligence, if any you have found, proximately caused or contributed to the Plaintiff's injury of April 24, 1959.

Answer "_____%."
To which the jury did not answer.

QUESTION NO. 11

"Do you find that the Plaintiff's injury was the result of an unavoidable accident?

Answer 'It "was" *or* "was not" an unavoidable accident."

To which the jury answered 'it was".

After the arguments of counsel, the jury, on said 20th day of March, 1962, retired to consider their verdict and answers to said interrogatories, and on the 20th day of March, 1962, returned into open court the following verdict and answers as stated above and signed by the Foreman, Marvin W. Franer.

Said verdict and answers of the jury were received in open court, and after each and all of said jurors declared the same to be their verdict, the said verdict was ordered filed and the jury ordered discharged.

It appearing to the Court, and the Court being of the opinion and the Court here and now finding, that under the pleadings, evidence, stipulations and the verdict of the jury, Judgment should be rendered herein in favor of the defendant, Sinclair Refining Company, and against the plaintiff, Julian Quintero, that plaintiff take nothing against the defendant on his suit for damages under the Jones Act; it is therefore,

ORDERED, ADJUDGED and DECREED that the plaintiff, Julian Quintero, take nothing from the defendant, Sinclair Refining Company, and that defendant, Sinclair Refining Company, recover all court costs herein against plaintiff, Julian Quintero;

It is further ORDERED, ADJUDGED and DECREED by the Court that by this judgment, Sinclair Refining Company is hereby held discharged and acquitted from any and further liability by reason of the causes of action asserted in this suit and the judgment herein rendered.

DATED AND ENTERED this ____ day of ____, 1962.

United States District Judge

APPROVED AS TO FORM

W. JILES ROBERTS
Attorney for Plaintiff

BAKER, BOTTS, SHEPHERD & COATES

By _____
Attorney for Defendant

EXHIBIT C

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action Number 13,140

JULIAN QUINTERO, *Plaintiff*,

v.

SINCLAIR REFINING COMPANY, *Defendant*.

JURY CHARGE AND EXCEPTIONS THERETO

I, Grant E. Perry, official court reporter for the United States District Court in and for the Southern District of Texas, do hereby certify that the following is a true and correct record of the charge given in the trial of the above-entitled case, heard before His Honor, Ben C. Connally, and a jury, on the 20th day of March, A.D. 1962, at Houston, Texas.

Witness my official hand at Houston, Texas, this 26th day of March, A.D. 1962.

GRANT PERRY

APPEARANCES

MR. W. JILES ROBERTS
Americana Building,
Houston, Texas
Attorney for the Plaintiff.

MESSRS. BAKER, BOTTS, ANDREWS AND SHEPHERD
(By Mr. Don F. McNeil)
Esperson Building,
Houston, Texas
Attorneys for the Defendant.

THE COURT: Ladies and gentlemen of the jury: At this stage of our proceedings, when the evidence has been concluded, and when the parties have had a chance to argue the case to you, it becomes my duty to give you the Court's charge. By that I mean that I will discuss your function as jurors, I will instruct you upon law of the case, and will discuss the evidence with you to some extent.

First, as to your function: Whenever it appears in the trial of a case that there is a conflict in the evidence, some witnesses testify that a matter occurred in one fashion and other witnesses testify that it occurred in some other fashion, or where from the evidence there are differing conclusions or inferences to be drawn, some agency of the Court must weight and consider that conflicting testimony and must determine which is true and credible and worthy of belief, and what is not. Or you must determine which conclusions and inferences to be drawn from the testimony are the more reasonable and the more logical and the more likely to be the proper ones, and the truth of

the matter. That is the function which you ladies and gentlemen who compose the trial jury serve here.

It is your duty, having heard the testimony from the witnesses, to consider it carefully and to determine what is truth and what is fiction, and to determine what are the proper conclusions to be drawn from that testimony. You are permitted to believe as credible and as true everything that a particular witness may have told you; or you are permitted to decline to believe everything that a witness has told you. You are permitted to accept as true part of what a witness has said, and to decline to believe other portions of the testimony of that same witness.

We think that if a witness looks you in the eye when he testifies, if his testimony sounds reasonable and logical, that those are indications that he is a credible witness. On the other hand, we think that if he equivocates when answering the questions, if he seems to be unwilling to answer the questions fully and completely, if his testimony doesn't seem to hold water or to make sense, as we say, those are indications that his testimony may not be entirely worthy of belief.

Also, we may consider the interest which a particular witness has in the case. One or two of the witnesses were employees of Sinclair, the third mate and the boatswain. It may be that they were perhaps influenced to some extent by the fact that their employer was the defendant here, and it may be that they would undertake to perhaps color their testimony somewhat in his favor, or in favor of the employer. On the other hand, the plaintiff himself, of course, is the person most interested in the outcome of this case, and you might consider that his testimony was

colored somewhat in his own favor. I am simply suggesting that those are some factors which you may want to consider in passing upon the truth and the credibility of the witnesses. You ladies and gentlemen are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given their testimony.

Now, in this Court, I should tell you, too, that the Judge is permitted, if he sees fit to do so, to comment upon the evidence. By that I mean that I am entitled to tell you which witnesses I think were credible and which ones I think were not, or where the truth of the matter lay, or even to tell you what verdict you should bring in. I have no expectation of doing so, although I will discuss the evidence with you to some extent.

But I instruct you that if, from what I say, you draw conclusions or inferences as to my own feelings about the facts of the matter, you are at perfect liberty to disregard it, and you should be governed entirely by your own conclusions as to what the facts of the matter may be. The law of the case you will take from the Court's charge and be governed thereby. As to the facts and the evidence, you are at perfect liberty to disregard whatever I say to you about it, because that is your exclusive prerogative, and I have no desire to trespass upon it.

Now, I am submitting the case to you ladies and gentlemen on a series of questions, in each of which I have provided the space for you to write in and insert your answer. The first question inquires as to whether the P. W. THIRTLE was unseaworthy immediately before and at the time of the plaintiff's accident of April 24th, 1959. In that connection, I instruct you that the law imposes upon the ship owner, Sinclair Refining Company here, the duty to furnish a seaworthy vessel. By that I mean that

the vessel and all of her parts, equipment, tackle, rigging and appurtenances must be reasonably suitable and fit for the purpose to which it ordinarily is used or put. That does not mean that the vessel and the equipment and tackle, and so forth, has to be the very newest or the very best or the most modern, but it does mean that it must be reasonably suitable for the use to which it ordinarily is put. Seaworthiness or unseaworthiness does not depend upon negligence or fault; and in the event the vessel or any of her equipment, tackle, rigging, and so forth was not reasonably suitable for the use to which it was put, then the defendant would be liable, even though perhaps without knowledge of that dangerous condition.

So the first question is this: "Was the SS P. W. THIRTLE unseaworthy immediately before and at the time of plaintiff's accident of April 24, 1959?" The burden of proof is upon the plaintiff — I will explain what I mean by that to you in a moment — and you will answer either that she was or that she was not unseaworthy.

The contentions of the parties in that regard, as I understand it, are like this: The plaintiff says, first, there were not enough men provided to do this particular job. You have heard all of the evidence on that score. Apparently this large hose had already been affixed to the outlet, the faucet, we would call it, of the vessel; and the other end was to be lowered to the deck of the vessel lying alongside. They were not doing that manually, because it was too heavy; they had a winch and power equipment, and they were picking up this loose end and lifting it over the rail, to be lowered over the side. Apparently it became entangled in some fashion with the rail, and the plaintiff

left his position at the winch over about the center of the vessel, and went to in some wise assist.

The plaintiff also contends — well, first I will conclude that. In the event the employer failed to have enough men available to do that job, you would be warranted in finding that the vessel was unseaworthy by reason of that fact, because having a sufficient and adequate crew is one of the requirements of having a seaworthy vessel. The plaintiff would have us believe that there were insufficient men, that he was summoned hastily to leave his position at the winch and run over and assist. The other witnesses, as I recall their testimony, were somewhat to the contrary. Certainly the boatswain and the third officer told us that there was enough manpower available, and that no one ordered the plaintiff to do so, but that he thought he saw a need for it and went over there.

In the event that there was a sufficient crew available, or sufficient manpower, then the vessel would not be unseaworthy on that account. If there was insufficient manpower available to do the job, you would be warranted in finding she was unseaworthy on that account.

The plaintiff also contends, as I understand it, that the vessel was unseaworthy because the rope, as we landlubbers would refer to it — sailors all seem to call it a line — which was some six or eight inches in diameter, I believe they said, a heavy rope which was used to tie the THIRTLE alongside the other vessel, was not all used for that purpose, and there was a great deal of it left over. Something had to be done with it, and the witnesses tell us that it was coiled upon the deck, running lengthwise of the vessel. There is some dispute in the evidence as to just where this rope was coiled. The plaintiff, as I understand his testimony, places those coils of rope up very close to

the winch, where it would be in his way and perhaps in the way of the other seaman who was working on the drum of the winch. The other witnesses, as I understand their testimony, place it considerably farther aft. The plaintiff has also told us, as I understood it, that the rope was not neatly coiled side by side, but that it was simply piled there more or less in a helter-skelter fashion, as I understood his testimony.

If you believe what he has told you, if you adopt that version of it, that the rope was simply piled in an unorderly fashion, and in such position that the plaintiff did not have a safe place to work by reason of that fact, that in going from his place by the winch to the rail, he of necessity was obliged to run some risk by reason of stepping on this loose and uncoiled rope, you would be warranted in finding the vessel unseaworthy on that score. Of course, if you do not accept that version of it, then the contrary would be true.

The second question is this: "Was the unseaworthiness, if any you have found, a proximate cause of the plaintiff's injury?" That term has a legal signification. Proximate cause; not approximate, but proximate cause. And by that term, as I use it here, is meant that cause which, in a natural and continuous sequence, produces an event, and without which the event would not have occurred. And to be a proximate cause of an event, it should have been reasonably anticipated and foreseen by a person of ordinary prudence, in the exercise of ordinary care, that the event or some similar event would result from such cause as a natural and probable consequence. There may be more than one proximate cause of an event.

Hence, if you have found the vessel to be unseaworthy, and only in that event, you will determine whether or not

this unseaworthy condition was a proximate cause of the plaintiff's injury.

The third question inquires as to whether the defendant Sinclair was negligent in any particular immediately before and at the time of plaintiff's accident of April 24, 1959. Negligence is a somewhat similar, but not entirely similar, concept to the unseaworthiness doctrine. By the term negligence, as we use it here, is meant a want of ordinary care or a failure to use ordinary care. And by the term ordinary care is meant that degree of care which a person of ordinary prudence would exercise under the same or similar circumstances.

The law likewise imposes upon the defendant ship owner the obligation to use due care for the safety of the seamen aboard. The plaintiff argues that those same acts which I mentioned awhile ago in connection with the unseaworthiness issue also constituted negligence. Plaintiff says that the rope was piled in a dangerous position and a dangerous fashion; that that constituted a failure on the part of the master and crew of the vessel to use ordinary care for the plaintiff's safety; and that that lack of ordinary care constituted negligence which was a proximate cause of the plaintiff's injury.

So I ask you in number three, first to find if the defendant was negligent; in question number four, if you have found the defendant to be negligent, I ask you to set out in what particular you find the defendant to be negligent, and if you have so found, probably it would be on the basis of one of the contentions which I have suggested. And question number five is as to whether that negligence was a proximate cause of the plaintiff's injury.

The next question inquires as to the damages which the plaintiff has sustained as a direct and proximate result of his accident of April 24, 1959. In answering this question, there are certain elements of damage which you may and should consider. Those elements of damage are exclusive. Hence, you will consider these and none other. First, the loss of earnings which were directly and proximately the result of the injury suffered by the plaintiff aboard the P. W. THIRTLE. In arriving at this, you may consider the wages and the board and room furnished during the course of his employment on the THIRTLE prior to the injury, and also, of course, the wages that he earned when employed on other vessels. You will consider any loss of earning capacity in the future, if you determine that he will suffer a loss of earning capacity in the future from and after the date of this trial.

Next, you may take into account the pain and suffering in the past and down to the date of trial, directly and proximately resulting from the injury, and any future pain and suffering, if you find that the plaintiff will in fact suffer pain in the future from and after the date of the trial. That is, his loss of earnings from the accident down to date, plus his loss of wage-earning capacity in the future; his pain and suffering from the time of the accident down to date, plus any pain and suffering which he may suffer in the future.

Now, on those questions which I have just discussed with you, that is, numbers one through six, the burden of proof, ladies and gentlemen, is upon the plaintiff. When I say that the burden of proof is upon the plaintiff, I mean that the burden is imposed by law upon him to prove his side and his theory of those questions by a preponderance of the evidence. And by that I mean by

the greater weight and degree of the credible evidence before you. The plaintiff must convince you by the greater weight and degree of the credible evidence that he is correct on those first six questions. And if you are not convinced by a preponderance of the evidence on those, in other words, if the evidence in favor of the defendant preponderates, or if the evidence you find to be equally balanced, the defendant is entitled to your verdict on those six questions.

Now, the next question, number seven, inquires as to whether the plaintiff himself was negligent in any particular immediately before and at the time of his accident of April 24th. The law also imposes upon a seaman the obligation to use ordinary care for his own safety; just as the law imposes the obligation on the vessel to use ordinary care for the seamen's safety, so does he have an obligation to use ordinary care. And if he is injured by reason of his own negligence or his own failure to use ordinary care, the amount of his recovery is reduced in proportion, in the same ratio that his negligence bears to the negligence of the vessel. It is the defendant's contention that the plaintiff himself was guilty of negligence here, if anybody was at fault. The defendant argues that if the rope was lying in a dangerous position, or if it was in a dangerous location, and also if it was piled carelessly, that all the plaintiff had to do to avoid this danger was to walk around it, a distance I believe the witness has said was some five feet, another two or three steps; that he obviously saw and was aware that the rope was in the condition that it was, and that if there was any fault by reason of that situation, it was his. They also argue that he was negligent in hurrying or running across the rope, that there was no great emergency, that there was no need for a man to take any unnecessary risks in

walking from the winch to the rail and from the rail back to the winch.

If you find the plaintiff to have been negligent in answer to number seven, I ask you to set out in what particular the plaintiff was negligent, and then I ask you as to whether such negligence was a proximate cause. On those three questions, numbers seven, eight and nine, the burden of proof is upon the defendant to prove by a preponderance of the evidence that the plaintiff was negligent, and that his negligence was a proximate cause of the accident.

Then, if you have found the plaintiff to be negligent, I ask you, in number ten: "State in what proportion or percentage the plaintiff's negligence, if any you have found, proximately caused or contributed to the plaintiff's injury of April 24, 1959." And you may answer that simply by stating the percentage that you may find. If you have found the vessel to have been at fault, and if you find the plaintiff to have been at fault, then you will find this percentage answer to number ten; and the law reduces the plaintiff's recovery by that percentage.

Question number eleven is this: "Do you find that the plaintiff's injury was the result of an unavoidable accident?" An unavoidable accident is an unforeseen and unanticipated event which occurs without the negligence of either of the parties having proximately caused the same: and the burden of proof is upon the plaintiff to prove that the accident in question was not an unavoidable accident. That is still another alternative that you might determine to have been the case. When either party was at fault, but nevertheless the plaintiff did receive this injury, then it might constitute an unavoidable accident.

Now, I think that constitutes all I have to say to you ladies and gentlemen. You will understand, I am sure, that for the plaintiff to recover he must prove to your satisfaction by a preponderance of the evidence that the vessel was unseaworthy or that the defendant was negligent. Those are the first and the third questions; and hence, if you find, in answer to number one, that the vessel was seaworthy or was not seaworthy, as I have put it here; and if you find in answer to number three that the defendant was not negligent, it will not be necessary for you to go through all of these other questions and answer those questions; that will settle the matter. On the other hand, if you find that the vessel was unseaworthy, or that the defendant was negligent, then you must proceed and answer all of the remaining questions, because they will then become material and important.

Now, the law gives these lawyers a right to object to my instructions to you outside of your presence and hearing. I don't believe that will take long; I am going to ask you to step in the jury room just for a moment while I give them a chance to do that. Will you step in with the bailiff, please?

(The jury withdrew from the courtroom.)

THE COURT: Are there objections from the plaintiff?

MR. ROBERTS: Yes, Your Honor. Now comes the plaintiff and makes these objections and exceptions and further requests for charge:

We request the Court to charge the jury, in addition to the charges heretofore given: "You are instructed that in your deliberations concerning this case, that the receipt by plaintiff herein of maintenance or transportation monies

does not constitute a defense herein, and you will give no credit to the defendant Sinclair Refining Company in any award of damages to the plaintiff, if any, for such maintenance and/or transportation money paid the plaintiff herein, because such matters are a separate and independent matter from the matters made the basis of this suit."

We have it in writing, if the Court wishes.

THE COURT: It is a little late for a requested charge. That should have come in this morning some time, counsel.

MR. ROBERTS: Your Honor, I realize that in one sense it is late, but you will recall we earlier asked the Court, before we argued the case, for the Court's charge.

THE COURT: You asked for a copy of the charge, and I told you it was oral here. I told you what I expected to give.

MR. ROBERTS: Yes, sir.

THE COURT: You may go forward.

MR. ROBERTS: I will only say here that it was not presented earlier because an opportunity had not been afforded to present this to the Court.

THE COURT: It will be denied.

MR. ROBERTS: Now, we object to the definition of proximate cause as given by the Court to the jury as it applies to unseaworthiness, for the reason that it injects the issue of negligence, because it requires the jury to find that a person of ordinary prudence would have reasonably anticipated that such a matter might occur, that is, the injury. This is a negligence definition of proximate cause; it does not relate to unseaworthiness and is likely, in their

minds, to confuse the issues of negligence and unseaworthiness. We have prepared a definition of proximate cause as relates to unseaworthiness, which we request the Court to give, and which reads as follows —

THE COURT: If you want me to read it, I am not going to give it, because the time to give me any requested charges was this morning before the case was argued.

MR. ROBERTS: Your Honor, may I present for marking at this time both of these requests?

THE COURT: You may. Note that they were tendered for filing after the argument of counsel, and after the charge was given.

You may go forward.

MR. ROBERTS: We request the Court to clarify the charge on unseaworthiness as it relates to the manning or manpower, to clearly show that the matter for the jury to consider as to whether or not the ship was seaworthy by virtue of the manning was not the issue of whether or not the men were aboard the vessel, but whether they were actually ordered out for use, because I believe that the way it presently reads, it could be confused by the jury to read that the men being aboard the vessel would mean that the vessel was seaworthy.

We object to the issues and except to them relative to the definition of reducing the plaintiff's — first, on the issue of contributory negligence, the submission of it, on the grounds that there has been no evidence or no adequate evidence, proper evidence, to raise the issue of any contributory ngligence on the part of the plaintiff. We say that it is not a proper issue. Secondly, that if we be mistaken there, and that it is a proper issue, then the definition of the Court relates the proportion of negligence

of the plaintiff to the proportion of negligence of the defendant, as distinguished from asking the jury by what percentage that it should be reduced because of his contributory negligence, if any, for the reason that this does not take into consideration any matter of the vessel's unseaworthiness; and if it is related solely to negligence to negligence, there is a great likelihood that we will have a verdict that will be such that the plaintiff would suffer a reduction when it should not be reduced, because of the negligence to negligence proportion, as distinguished from just asking how much it should be reduced, if any, by contributory negligence.

I don't believe that the Court placed the burden of proof on special issue number ten. We believe the burden of proof should be upon the defendant if the issue is to be submitted.

We object to the submission of unavoidable accident, for the reason that it does not differentiate between negligence and unseaworthiness; for the further reason that it is not a proper issue to be submitted in this sort of case; that such issue confuses negligence and unseaworthiness; and secondly, there is no evidence in this case that this injury was caused or contributed to be caused by anyone other than the instrumentalities of the plaintiff or the defendant, that is, by the action of the plaintiff or by the negligence of the defendant, or the unseaworthiness of the vessel, and thereby requires the plaintiff to carry a burden which the law does not impose on him to carry. We further object to the Court's charge in requiring the plaintiff to have to prove to the jury's satisfaction by a preponderance of the evidence, as distinguished from a preponderance of the evidence, because if the plaintiff has to prove to the jury's satisfaction by a preponderance of the

evidence, they may feel that they are entitled, believe that they are entitled to impose an entirely different standard of conduct that the law requires.

I believe that's all.

THE COURT: The defendant?

MR. McNEIL: No objections to the Court's charge.

THE COURT: Have them come in.

(The jury returned to the courtroom.)

THE COURT: You all won't need to be seated; if you will just step in here where all of the jurors can hear me for a second, it will be adequate.

Counsel suggests that I failed to instruct you as to the burden of proof on question number ten. The burden is upon the defendant as to that issue.

I will ask Mr. Franer — where are you? Here you are. Will you serve as foreman of the jury, please, sir? Here is the verdict; you may take the exhibits with you. It is now a little after 12:00; I expect you all would like to take your recess and begin work after lunch, would you not? What time would you like to come back? 1:15? 1:30?

THE FOREMAN: The sooner the better.

THE COURT: Can you make it by 1:00 o'clock?

(The jurors indicated in the affirmative.)

The Court: All right. The bailiff will be in attendance, and he will have these papers for you, and you can just return to the jury room and begin your deliberations at that time.

In the event some of you all should take lunch together, don't discuss the case or talk about it during that time. Wait until everybody is together in the jury room, if you please. Be back at 1:00, then.

Recess until that time.

EXHIBIT D

APPENDIX 46 U. S. C. A. 688

RECOVERY FOR INJURY TO OR DEATH OF SEAMAN

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, Sec. 20, 38 Stat. 1185; June 5, 1960, c. 250, Sec. 33, 41 Stat. 1007.

EXHIBIT E

APPENDIX 45 U. S. C. A. 51

LIABILITY OF COMMON CARRIERS BY RAILROAD IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE; DEFINITION OF EMPLOYEES

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404.

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No. 1072

IN THE

Supreme Court of the United States

JULIAN QUINTERO,

Petitioner,

v.

SINCLAIR REFINING COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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No. 1072

In The

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Julian Quintero,

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v.

Sinclair Refining Company,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTIONS PRESENTED

1. Is a jury's determination of no liability of the defendant shipowner to be reversed?

STATEMENT OF THE CASE

The petitioner, a seaman, instituted suit against the respondent alleging that its employees were negligent and its vessel unseaworthy. After due deliberation, the jury brought in its verdict by answering interrogatories. The

jury found the vessel *was* seaworthy (Interrogatory No. I); that respondent was *not* negligent (Interrogatory No. III) and that petitioner's injury *was* the result of an unavoidable accident (Interrogatory No. XI).

The District Court entered judgment for respondent. The Court of Appeals affirmed. The petitioner now seeks a writ of certiorari.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

The Court of Appeals for the Fifth Circuit, after reviewing the evidence, affirmed the entry of judgment in respondent's behalf by the trial court. The Court of Appeals held that the controlling issues in the case were whether there was unseaworthiness of the vessel and negligence on the part of the respondent. Without affirmative findings to these interrogatories petitioner could not recover. The Court relied on *Neal* v. *Lykes Bros. Steamship Co., Inc.*, 5th Cir., 306 F. 2d 313.

However, without even discussing the Court of Appeals' decision, the petitioner seeks certiorari on the theory that an issue of unavoidable accident was improperly submitted to the jury. For this novel proposition, he cites two cases, neither of which has application.

In Mahnich v. *Southern Steamship Company*, 321 U.S. 96, the Court held a defective appliance would create the basis for a finding of unseaworthiness. It is vital to note that in *Mahnich*, the Supreme Court did not do two things which the petitioner claims: first, hold the vessel unseaworthy without a defective appliance (in *Mahnich*, liability was predicated on a broken ship's rope), and second hold that a vessel is responsible for an injury occurring without an unseaworthy condition.

Similarly, in *Tiller* v. *Atlantic Coast Line Railroad Company*, 318 U.S. 54, the Court did not hold the respondent liable without a finding of negligence. The Supreme Court held that if negligence was found, the employer could not defeat such a finding by raising the defense of assumption of risk.

The instant case is clearly not within the purview of the above decisions. First, the trier of fact found that vessel and all its appurtenances *were* seaworthy and that the respondent was *not* negligent. No defect and no negligent act or omission was the cause of the petitioner's injury. Whether or not the submission of an issue of unavoidable accident may or may not have been proper in a case in which there is some defect or negligent act or omission is a question not involved in this appeal.

Petitioner further complains that the trial court required him to carry a burden of proof heavier than the law requires. It is elementary that the trial court's charge must be considered as a whole. The phrase complained of, "he must prove to your satisfaction by a preponderance of the evidence" was used only one time, and even if harmful, cannot be considered as so prejudicial as to cause the reversal of the judgment entered on behalf of the respondent. Even the constant use of the words, "satisfy", "convince", "convincing", and "clear preponderance" is not sufficient. See *Oldkirk* v. *Sears, Roebuck & Co.*, 274 F. 2d 441 (9th Cir., 1960).

Petitioner is now appealing to the appellate courts to save him from an adverse verdict after trial by jury. He raises issues which present a facade to the real problem that there was no findings of unseaworthiness and negligence.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should not be granted.

Respectfully submitted,

.....

WILLIAM C. HARVIN

.....

DON F. MCNIEL

CERTIFICATE OF SERVICE

This is to certify that on the .... day of ....., 1963, a true and correct copy of this Brief in Opposition was served upon W. Jiles Roberts, Attorney for Petitioner, 617 Americana Building, Houston 2, Texas, by placing same in the United States mails, properly addressed, postage prepaid, Certified Mail — Return Receipt Requested.

SUPREME COURT
PERSONAL COPY OF W. JILES ROBERTS

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NO. 1072

IN THE

Supreme Court of the United States

JULIAN QUINTERO, *Appellant*

v.

SINCLAIR REFINING COMPANY, *Appellee*

SUPPLEMENTAL BRIEF IN ANSWER TO THE BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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SUPPLEMENTAL BRIEF IN ANSWER TO THE BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

I.

Respondent's brief in opposition to petition for certiorari fails to consider the basic question of whether or not the jury was improperly charged on the law of the case and thereby effectively directed into returning an improper verdict in this case.

It is true that the Fifth Circuit relied upon *Neal v. Lykes Bros. Steamship Co., Inc.*, Fifth Circuit, 306 Fed. 2d 313. However, it is submitted that such decision was wrongly decided and in connection with this, counsel for Petitioner shows that except for a delay in the mails that

a petition for certiorari would have been filed in the *Neal* case, supra.

This Court in *Tiller v. Atlantic Coast Lines Railroad Company*, 318 U.S. 54, 63 S. Ct. 444, made no holding with respect to the liability of the respondent in such case but only interpreted the basic 1939 Amendment to the FELA which abolished every vestige of assumed risk, see *Tiller*, supra, p. 58 U.S., 446-447 S. Ct., where the Court says:

> "We find it unnecessary to consider whether there is any merit in such conceptual distinction between aspects of assumption of risk which seem functionally so identical, and hence we need not pause over the cases cited by the court below, all decided before the 1939 Amendment, which treat assumption of risk sometimes as a defense to negligence, sometimes as the equivalent to non-negligence. We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 Amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'. As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Appliance Act of 1893, 45 U.S.C.A. Sec. 1, et seq., 'Unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of risk under another name' and no such result can be permitted here."

In *Tiller*, supra the trial court directed a verdict against the appellant. In the present case the trial court did not direct a verdict against the Petitioner but did, by an im-

proper charge, lead the jury to believe that unavoidable accident—a specie of assumed risk—was a defense and thereby effectively led or directed the jury into returning a verdict based upon a theory of law abolished by Congress and not recognized by this Court. This was just as harmful to the injured Petitioner herein as the action of the trial court in the *Tiller* case, supra in directing a verdict against the widow of the decedent. In either event the ultimate result was the same.

Petitioner accepts, as a matter of course, the premise that he must show either that the vessel was unseaworthy or that Respondent was negligent, failing which he cannot recover, but even so he is entitled to a charge to the jury that is a correct statement of the law and which does not lead the jury into returning a verdict that applies an erroneous concept of the law for the reason that unless he is given this, then he is as effectively deprived of his rights as if he were not allowed a trial. The practical effect of an erroneous charge such as this charge is actually a greater burden to an injured workman than to bear the injury without any hope of payment because an illusory right of recovery upon the trial of his cause is held forth if he can show negligence or unseaworthiness causing his injury and the injured workman believing that the law gives him recovery upon his meeting conditions then incurs the expense and difficulty of a trial only to find that his right of recovery was an illusion promised but not to be obtained because of common law technicalities.

This Court has heretofore made it abundantly clear that the master no longer has the common law defenses available to defeat the injured employee's cause of action. See, *Rogers v. Missouri Pacific Railroad Company*, 77 S. Ct

443, p. 449, 352 U.S. 500, p. 507-508, where the Court says:

> "The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit."

The Fifth Circuit in its opinion does not disagree with Petitioner as to his contention of the law but condones the submission by deciding that it was not prejudicial to Petitioner.

The Fifth Circuit recognizes the fact that a charge on unavoidable accident under the FELA is confusing and should not be given. See *Page v. St. Louis Southwestern Railway Company*, ~~32~~ 312 Fed. 2d 84 p. 93, where the Court says:

> "We would agree that ordinarily in a case under this Act a charge on unavoidable accident is confusing and tends to distract the jury's attention from the simple issues of whether the carrier was negligent and whether that negligence was the cause, in whole or in part, of the plaintiff's injury. . ."

If it is confusing to the jury, then it is prejudicial to petitioner's cause of action to charge on it and place the burden on petitioner to show that his injuries did not result from an unavoidable accident.

II.

The phrase complained of "He must prove to your satisfaction by a preponderance of the evidence", is used

only one time but taken in context as it was used at the end of the Charge with the trial court occupying the neutral position in the lawsuit and advising the jury that the Appellant was required to prove his case to a certainty (the same as satisfaction) required the Petitioner to assume a heavier burden of proof than he was required under the law to assume and resulted in Petitioner's harm especially in view of the Court's erroneous Charge on unavoidable accident. This instruction required Petitioner to prove to a certainty that his employer was negligent and/or the vessel was unseaworthy while the Court was also erroneously suggesting to the jury that Petitioner's injuries may have resulted from an unavoidable accident, both of which were erroneous and thereby deprived Petitioner of a fair determination of his rights under the applicable law.

WHEREFORE, premises considered, Petitioner prays that the petition for certiorari be granted and that upon hearing the case be reversed and remanded for new trial.

Respectfully submitted,

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Attorneys for Appellant

I hereby certify that I have served a true copy of the foregoing upon Respondent by mailing two copies of same to Baker, Botts, Shepherd & Coates, Honorable Wm. C. Harvin and Don F. McNiel of counsel, to them first class United States mail on this the _____ day of June, 1963.

ARTHUR COMBS